tween carriers; they are not 'rates' or 'charges' as those terms are used in section 3(4) of the act. A seemingly contrary opinion expressed in *Western Pacific R. Co.* v. *Southern Pac. Co., supra*, upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here."

In effect, the Commission there says that by the device of an arrangement for divisions of a joint rate with favored connections, while refusing to accord similar arrangements to other and less favored connections, carriers can put themselves beyond the reach of the provisions of Section 3(4). The Commission and the District Court, have failed to recognize that in the *Mechling* case the Supreme Court in addition to the question of discrimination by means of differing proportional rates, had before it also the matter of discrimination by means of divisions, and condemned both.

In that case the Commission (in *Grain Proportionals, Ex-Barge to Official Territory,* 262 I.C.C. 7), had approved, as to grain reshipped from Chicago which originated west of the Mississippi River, higher proportional rates to eastern destinations when the grain arrived at Chicago by barge than when the grain arrived at Chicago by rail. The Commission also had approved those same proportional rates on ex-barge grain originating at points in Illinois from which the railroads maintained joint rates out of which the eastern railroads accepted divisions lower than the said proportionals on ex-barge grain from the same origins. The Supreme Court sustained the decree of the District Court which set aside that approval by the Com-

mission. The decree so affirmed enjoined the Commission's order insofar as that order

> "Prescribes, approves, authorizes, or countenances *in any manner whatever* a charge for railroad services in transporting east from Chicago grain that has arrived there by barge that is higher than any rate or charge that is contemporaneously exacted *in any form or under any guise* for railroad services which do not appear from legally relevant findings of the Commission supported by evidence to be substantially different from railroad services in transporting east from Chicago like ex-rail grain from like origins west of Chicago." (Italics supplied.)

In its brief in the Supreme Court in that case, the Commission took the position that the proportional rates on ex-rail grain from origins west of the Mississippi River had the same status as the divisions of the eastern lines out of the joint all-rail rates from Illinois origins. At pages 40-41 of its brief the Commission said:

> "Consequently there is no distinction to be made in fact between the charges for transportation from Chicago to the East accruing to the eastern carrier whether they be obtained in the form of a separately established proportional rate or as a division of the joint through rate."

On that premise the Commission contended that the lack of equality with charges on ex-barge grain from Chicago to the East was not in violation of Section 3(4) because both the proportional rates and the divisions in the case of ex-rail grain were simply parts of through rates and the lawfulness of the relationship should be tested only from the through rate standpoint.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees*

Appeal from the United States District Court for the Southern District of Texas, Houston Division

STATEMENT AS TO JURISDICTION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

At page 42 in its brief in the Supreme Court in the *Mechling* case the Commission said:

> "A division of a joint rate is not a proper standard by which to test the lawfulness of separately established rates."

In its decision in the *Mechling* case, the Supreme Court did not find it necessary to pass in specific terms upon that contention. However, the facts in the case before it, the breadth of the decree affirmed, and the obvious intent of its opinion make plain that it considered a difference between a division on all-rail grain and a higher proportional on ex-barge grain to be embraced by and offensive to the prohibition against discrimination in Section 3(4) to the same extent as when the difference is between two separately established proportional rates.

In striking down the order of the Commission, the Supreme Court said, at page 577 of its opinion in the *Mechling* case:

> "The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations *if accomplished by through rates.* But this assumption would permit the destruction or curtailment of the advantages to shippers of cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. This case proves that. * * *"
> (Italics supplied.)

Appellees may contend that the precise question involved in the instant case was not decided by the Supreme Court in the *Mechling* case inasmuch as the Court did not specifically discuss by name the lower

divisions of all-rail rates from Illinois origins in relation to the higher proportional rate on ex-barge grain. If that were true, it would become all the more important to have the question now settled by the Supreme Court.

In the first place, the decisions of the Commission and the District Court are plainly contrary to the spirit of the *Mechling* case, and turn on a matter of form which disregards the substance. The Commission should have the guidance of the Supreme Court so that in this and other cases involving water carriers it will take jurisdiction when the substance demands.

In the second place, if the opinion of the District Court were to settle the law, the way would be open for railroads to evade, without fear of Commission or Court restraint, not only the spirit but the letter of the rule of the *Mechling* case. To accomplish the latter, it would be necessary only for the railroads to establish joint through rates, in lieu of proportionals, for all-rail movements out of which the eastern rail lines would accept as divisions amounts less than the rates charged when the grain transported by them is received from their barge line connections.

On the *second* question, as to the right and duty of the Commission to take jurisdiction and provide redress under Section 3(4) when a carrier participates with one connecting carrier in through routes and joint rates and refuses similar participation to another connecting carrier under similar circumstances, the Commission and another District Court recently reached a conclusion directly contrary to its decision, and that of the District Court in the instant case. In *Denver and R. G. W. R. Co.* v. *Union Pacific R. Co.*, 287 I.C.C. 611, 658, 659, 660, after finding no important dissimilarity

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between the transportation conditions in connection with the favored connection as compared with the connection excluded from through routes and joint rates, the Commission, at page 660, concluded:

> "That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act."

The only apparent distinction between that situation and this, is that there two railroads were involved, while here the carriers discriminated against are barge lines. There was no finding of reasonableness or public interest as to the rates covered by the foregoing finding. The jurisdiction taken and the order entered were bottomed solely on Section 3(4), which specifically permits no distinction between rail and water connections. Upon judicial review, the District Court for the District of Nebraska, Omaha Division[1] sustained the quoted finding and the order based thereon, and said:

> "The Commission found there was no important dissimilarity between the transportation condi-

[1] In *Union Pacific Railroad Company, et al.* v. *United States, et al.* (not yet reported, opinion filed October 22, 1954). That case, involving other and much broader issues, now is pending before the Supreme Court on the Appellate Docket, in Nos. 117, 118, and 119. It does not embrace the questions, involved here, of differing treatment of rail and water connections, nor of whether the provisions of Section 3(4) reach a discrimination resulting from acceptance of a lower division on the traffic of one connection while demanding a higher published rate on the traffic of another, under the conditions of this case.

tions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3(4) clearly prohibits such discrimination."

In the instant case, the District Court erroneously refused to construe Section 3(4) with respect to the jurisdiction and duty of the Commission as did the District Court for the District of Nebraska in the case just cited. If Section 3(4) prohibited a difference of treatment of connecting rail carriers in that case, the law can be no different when carriers by water seek the protection of the same statutory provision.

The District Court in the instant case erroneously failed to recognize that the broad powers of the Commission to determine what through routes and joint rates would be reasonable, and the limitation on those powers, as set forth in Section 15 of the Interstate Commerce Act (49 U.S.C., section 15), have no pertinency and are not controlling when there is a clear showing of discrimination between connecting carriers specifically forbidden by Section 3(4).

If the decree of the District Court in the instant case is permitted to stand it will, in effect, deprive water carriers of the protection of Section 3(4) as to discrimination in charges and differences in treatment as to through route and joint rate arrangements, and will vitiate the requirements of the National Transportation Policy for impartial regulation and equality of treatment of competing modes of transportation.

The third and fourth questions presented are necessarily involved in the first and second questions above discussed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees*

Appeal from the United States District Court for the Southern District of Texas, Houston Division

---

STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of the Supreme Court of the United States, as revised, Dixie Carriers, Inc., Coyle Lines Incorporated, American Barge Line Company, and Federal Barge Lines, Inc., appellants, submit their statement to show that the Supreme Court has jurisdiction of this appeal and that substantial questions are presented.

It is submitted that the decision of the District Court failed to recognize and enforce the plain requirements of the Interstate Commerce Act as construed by the Supreme Court and for that reason the judgment should be reversed and the Commission's order should be enjoined and set aside. We believe the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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OPINION BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, is reported at 129 F. Supp. 28, and is appended hereto as Appendix A. The opinion of the Interstate Commerce Commission, on reconsideration, including the dissenting opinion of the minority of the Commission, is reported at 291 I.C.C. 422, and is appended hereto as Appendix B.

The District Court entered no findings of fact or conclusions of law apart from its opinion.

JURISDICTION

This suit was brought by appellants under Title 28 U.S.C., Section 1336 to set aside an order of the Interstate Commerce Commission, and trial was held before a three-judge court convened under Sections 2284 and 2325 of Title 28, U.S.C.

The judgment of the District Court, dismissing the complaint, was entered on February 16, 1955. Appellants' Motion for New Trial was denied by order of the District Court entered on March 28, 1955, and Notice of Appeal was filed in that Court on May 17, 1955.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U.S.C., Sections 1253 and 2101(b), and that jurisdiction of the Supreme Court is sustained by a large number of cases, including the following:

Interstate Commerce Commission v. *Mechling*, 330 U.S. 567;
Eastern-Central Association v. *United States*, 321 U.S. 194;
United States v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499;
United States v. *Baltimore and Ohio R. Co.*, 333 U.S. 169

Proof of Service

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, Donald Macleay, one of the attorneys for the several appellants on whose behalf the foregoing Statement as to Jurisdiction is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as follows:

1. On the United States of America by mailing copies in duly addressed envelopes with first class postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Honorable Stanley N. Barnes
Assistant Attorney General
Department of Justice
Washington 25, D. C.

James E. Kilday, Esquire,
Albert Parker, Esquire,
Maurice A. Fitzgerald, Esquire,
Special Assistants to the Attorney General
Department of Justice
Washington 25, D. C.

and with air-mail postage prepaid to:

Malcolm R. Wilkey, Esquire
United States Attorney for the Southern
District of Texas
Room 205, Post Office Building
Houston, Texas.

QUESTIONS PRESENTED

The questions presented involve a matter of statutory construction which arises out of the decision of the Interstate Commerce Commission of January 19, 1954 (291 I.C.C. 422), affirming a prior decision by Division 3 of the Commission of December 22, 1952 (287 I.C.C. 403). That decision denied the relief sought by appellants, who are regulated common carriers by water, in their complaint against Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, The New York Central Railroad Company, and Wabash Railroad Company, all of which are common carriers by railroad operating (so far as concerns the issues of this case) between East St. Louis, Illinois, and Danville, Illinois, and with which appellants connect at East St. Louis.

The matter complained of is the charging by said railroads of their East St. Louis-Danville local rail rate on ex-barge sulphur originating at Galveston, Texas, and delivered to them by their water carrier connections at East St. Louis, while contemporaneously joining with connecting railroads at East St. Louis in a joint through rate from Galveston and nearby producing points out of which said railroads accept a secret, contractual division less than said local rate. The services rendered by the said railroads from East St. Louis to Danville on the ex-barge sulphur are the same as on the through all-rail sulphur. The Commission held, as a matter of statutory construction, that the circumstances stated did not constitute discrimination between connecting carriers within the meaning of section 3(4) of the Interstate Commerce Act. [49 U.S.C. section 3(4)].

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with first-class postage prepaid to

Samuel R. Howell, Esquire
Acting General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Leo H. Pou, Esquire
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On the New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, by mailing copies in duly addressed envelopes with air-mail postage prepaid to

John A. Daily, Esquire
1225 La Salle Street Station
Chicago 5, Illinois

Palmer C. Hutcheson, Jr., Esquire
Room 1720 Niels Esperson Building
Houston, Texas

This, the ..... day of July, 1955.

DONALD MACLEAY

The dismissal of the complaint turned only on a question of statutory construction, the essential facts not being in dispute.

The questions presented by the appeal are:

1. Whether a division of a joint through rate is a "rate" or "charge" within the meaning of those terms as used in Section 3(4) of the Interstate Commerce Act [49 U.S.C. 3(4)].

2. Whether Section 3(4) makes unlawful the action of a carrier by railroad in participating with one connecting carrier in through routes and joint rates, while refusing similar participation to another connecting carrier seeking to engage in the same through transportation, where the said rail carrier performs the same service in each instance.

3. Whether the circumstances relied upon by the Commission as warranting the difference in treatment between appellants and the rail connections of the defendant railroads were legally sufficient for the purpose.

4. Whether the conclusion of the Commission is supported by adequate findings and substantial evidence.

STATUTES INVOLVED

The statutory provision primarily involved is Section 3(4) of the Interstate Commerce Act [49 U.S.C. 3(4)], as follows:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the re-

ceiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

The National Transportation Policy [49 U.S.C., preceding 1, 301, 901, and 1001], which by its terms permeates the entire Interstate Commerce Act and governs the administration and enforcement of all of its provisions, is as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

STATEMENT OF THE CASE

Appellants are common carriers by water subject to Part III of the Interstate Commerce Act. By means of through routes and joint rates among themselves they engage in the transportation of sulphur from Galveston, Texas, to East St. Louis, Illinois. At East St. Louis appellants connect with the four railroads named above, and which were defendants in the proceeding before the Commission. Said railroads operate rail routes from East St. Louis to Danville, Illinois, to which latter point sulphur is shipped from the Galveston, Texas, area. As to sulphur moved by barge to East St. Louis and then by rail to Danville, said railroads refuse to join appellants in through routes and joint rates and demand their full local rate.

The East St. Louis—Danville railroads join with southwestern railroads in through routes and joint rates on sulphur from Galveston and producing points in that area via East St. Louis to Danville. Their refusal to join appellants in through routes and joint rates and to afford to appellants treatment as favorable as that accorded to their southwestern rail connections was made the subject of a complaint which the apellants filed with the Commission on December 13, 1950.

By that complaint the appellants alleged that such refusal was unjust and unreasonable in violation of Sections 1 and 307(d) of the Interstate Commerce Act [49 U.S.C., sections 1 and 907(d)], and that the establishment of barge-rail through routes and joint rates on sulphur is necessary and desirable in the public interest. This phase of the complaint is mentioned only in the interest of completeness of statement, since it was not involved in the proceeding before the District Court and is not involved in this appeal. Ap-

pellants also alleged, *as a separate and distinct matter,* that the refusal of the East St. Louis—Danville railroads to join with them in such through routes and joint rates, while contemporaneously joining in such arrangements with rail connections, as described above, constituted a discrimination between connecting carriers in violation of Section 3(4) of the Interstate Commerce Act [49 U.S.C., section 3(4)].

At the hearing held on the complaint, the evidence showed that the defendant railroads assessed their full local rate for the services rendered in completing the haul to Danville in the case of sulphur received from their water carrier connections. The evidence also showed that for their services rendered under all-rail joint rates the defendant railroads accepted as compensation a division less than their said local rate, although there was no difference shown between the services rendered by them on ex-barge traffic and those rendered by them on all-rail traffic. The exact amount of said division is not known since that is a matter of private contract between the East St. Louis—Danville railroads and their southwestern connections.

The Hearing Examiner issued a proposed report in which he found that the circumstances described constituted a discrimination against appellants in violation of Section 3(4). The Commission, Division 3, in a report dated December 22, 1952, 287 I.C.C. 403, dismissed the complaint. That opinion was directed almost entirely to the question of the reasonableness of the through route and joint rate proposed by appellants, and to the failure of the appellants to adduce shipper evidence in support of such through route and joint rates. Division 3 did not deal with the issue

of discrimination under Section 3(4) except to enter the following general findings without stating or explaining the basis therefor:

> ". . . The record before us affords no basis for finding of unlawful discrimination under section 3(4) of the Act. * * * We find . . . that the allegation under section 3(4) of the Act has not been sustained. The complaint will be dismissed."

Appellants thereupon asked for reconsideration and oral argument before the entire Commission, which was granted. Upon such reconsideration, appellants limited their presentation to the separate issue under Section 3(4). The report of the entire Commission on reconsideration is dated January 19, 1954, 291 I.C.C. 422, and is reproduced as Appendix B hereto. In that report the Commission did give separate consideration, *but only as a question of law*, to the issue involving discrimination in charges as between connecting carriers, alleged to be in violation of Section 3(4). It held against the appellants on the sole ground that "divisions of joint rates are the result of contractual arrangements between carriers; they are not 'rates' or 'charges' as those terms are used in section 3(4) of the Act." (291 I.C.C. at page 424). Upon that construction of the statute, and not upon a finding that the difference in treatment of barge and rail connections was non-discriminatory as a fact, the Commission dismissed the complaint.

In their complaint in the District Court appellants sought judicial review only as to the correctness of the Commission's construction of Section 3(4) of the Act. It asked the Court to hold that the Commission had misconstrued the statute and to remand the case to the Commission with directions to proceed to a de-

cision upon a correct construction of the statute. The United States filed an answer in which it neither admitted nor denied the essential allegations of the complaint. The case in the District Court was defended by the Commission and by the rail carriers who were the defendants in the Commission proceeding.

The opinion of the District Court neither discussed nor passed upon the narrow question of statutory construction as to which the appellants allege the Commission committed error. Instead, it dealt almost exclusively with questions of fact as to reasonableness and public interest, questions as to which appellants did not assert error within the scope of judicial review. On the question of discrimination, the opinion of the District Court said:

> ". . . we think Plaintiffs have not shown their claim of discrimination to be meritorious * * *. "* * * Neither have Plaintiffs shown that the existing rates discriminate against them."

The findings and conclusions of the District Court do not even touch upon the question of whether a division of a joint rate is a "rate" or a "charge" within the meaning of Section 3(4) under the circumstances of this case, much less dispose of the question.

In an effort to obtain an opinion or conclusions of law from the District Court which would deal directly with that question, applicants presented to the District Court a motion for a new trial and to amend findings of fact and conclusions of law.

That motion was denied and this appeal was taken.

(a) Plaintiffs here, who were the complainants in the proceeding before the Commission, are common carriers by water, operating under certificates of public convenience and necessity, issued by the Commission. The American Barge Line Company and the Inland Waterways Corporation, operating Federal Barge Lines, render common carrier barge service on the Mississippi River between (among others) Port Sulphur (near New Orleans, Louisiana) and New Orleans, Louisiana on the one hand, and East St. Louis, Illinois, on the other hand, a distance of approximately 1,049 miles. The Coyle Lines, Incorporated, and Dixie Carriers, Inc., render common carrier barge service from Galveston, Texas, to New Orleans, Louisiana, a distance of approximately 357 miles. Each of the Intervening Defendants operate rail lines from East St. Louis, Illinois, to Danville, Illinois, a distance of approximately 184 miles. The Intervening Plaintiff, the American Waterways Operators, Inc., is here because of its interest in the legal questions involved.

(b) The volume of sulphur movement from the mines in Texas to Danville, Illinois, is approximately 20,000 tons a year. During the last six months of 1950, the preponderance of the sulphur traffic from Galveston to Danville moved by rail to Galveston, by barge to East St. Louis, and by rail beyond. That movement, however, was by a contract water carrier which has since discontinued operation. Thereafter the sulphur moved from the mines, not through Galveston nor over Plaintiffs' lines but on a joint through rate over an all-rail route, i.e. from the mines over the lines of the Texas and New Orleans Railroad Company directly to Shreveport, Louisiana, the Texas and Pacific Railway Company to Texarkana, Arkansas, the Missouri-Pacific Railroad Company (Guy A. Thompson, trustee) to East St. Louis, and the Wabash Railroad Company to Danville. The distance over that route from the sulphur mines is approximately 850 miles to East St. Louis, and is approximately 184 miles from East St. Louis to

Danville, making a total distance of 1,034 miles from the sulphur mines to Danville. As stated, the sulphur mines are in the Galveston area, but the distance from them to the port of Galveston is approximately 60 miles.

(c) The all rail joint through rates on sulphur (Galveston rate) from the sulphur mines to Danville is $9.184 per ton. The Commission found these rates to be on a "depressed basis" in that the combination local rates which would apply in the absence of such joint through rates is $11.686 or $2.502 higher than such joint rates. Such combination local rates are made up of rates of $8.75 from the mines to East St. Louis, and a local rate of $2.95 from East St. Louis to Danville.

(d) There are no joint barge-rail rates in effect either from the sulphur mines or from Galveston to Danville or any other point.[1] The combination barge-rail rate on sulphur from Galveston to Danville is $8.27, composed of Plaintiffs' joint barge rate of $5.32 from Galveston to East St. Louis and Intervening Defendants' rail rate of $2.95 from East St. Louis to Danville. The combination rate of $8.27 does not include unloading and loading and switching charges, etc., at East St. Louis. However, barge lines absorb, or are willing to absorb such charges at East St. Louis. Such charges are for unloading the barges 44 cents a ton, the switching charges are approximately 30 cents a ton, and other charges are approximately 15 cents a ton.

The price of sulphur at Galveston is $1.50 a ton higher when loaded in barges than when loaded in rail cars 60 miles away at the mines. The higher price reflects in part the rail rate of $1.10 per ton from the mines to Galveston, 11 cents for wharfage, 37 cents for unloading from cars to storage bins, 22 cents for transfer from bins to barges, 4.55 cents for stevedoring, and 1.41 cents for pier rental.

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[1] See Thompson v. United States, 343 U.S. 558, for a discussion of through routes, etc.

Such combination rate does not include and the barge lines do not absorb this Galveston item of $1.50 per ton.

(c) Complainants proposed and were refused the establishment of a joint through route and a joint through barge-rail rate of $7.67 for sulphur, not from the sulphur mines but from Galveston to Danville, to be divided $5.41 for the barge lines from Galveston to East St. Louis, and $2.26 for the rail lines from East St. Louis to Danville. The rate was arrived at by adding $1.01 to the Port Sulphur to Danville rate of $6.66. This proposal contemplated that the barge lines would absorb the charges mentioned at East St. Louis but there was no such commitment respecting the $1.50 charge mentioned at Galveston.

1. The case involves a construction of the Interstate Commerce Act as amended by the Act of 1940 respecting water carriers (49 U.S.C.A., Secs. 901, et seq.). Plaintiffs claimed before the Commission and claim here that under such Act the combination rates and charges on sulphur over barge-rail route from Galveston, Texas, through East St. Louis, Illinois to Danville, Illinois, were unreasonable, that they discriminated against Plaintiffs, and that the public interest required that a through barge-rail route and joint through barge-rail rates be established with reasonable differentials, etc.

The Commission, after a full hearing (Reports of December 22, 1952, and January 19, 1954) dismissed Plaintiffs' complaint.

Defendants' first contention here is that the findings and conclusions of the Commission are fully supported by the evidence, that its findings are adequate and in full accord with the Act and that its Order should not be set aside here. We agree that this is true.

Congress has with wholesome care clothed the Commission with the power and made it its duty after, as here,

a full hearing to determine when existing rates are discriminatory, where and under what circumstances through route and through rates should be established, etc. The Commission is given wide discretion and when its findings and conclusions are, as here, supported by the evidence and in accordance with the Act they will not be disturbed by the courts. Alabama Great Southern R.R. Co. v. United States, 340 U.S. 216; Capital Transit Co. v. United States, 97 F. Supp. 614; Interstate Commerce Commission v. Mechling, 330 U.S. 567; McLean Trucking Co. v. United States, 321 U.S. 67; Mississippi Valley Barge Line v. United States, 292 U.S. 282; United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515; Interstate Commerce Commission v. Union Pacific R.R., 222 U.S. 541; Virginia Ry. Co. v. United States, 272 U.S. 568; Western Pacific Chemical Co. v. United States, 271 U.S. 268; Ayrshire Corporation v. United States, 335 U.S. 573.

2. We have, however, independently of the conclusions reached by the Commission, considered the Record and reached substantially the same conclusion.

As we have pointed out, the Commission in determining the questions was required and we are required to consider not only Plaintiffs' desire for and interest in a through barge-rail route and through joint rate, but the effect thereof if established upon all others concerned. This rule is well stated in Ayrshire Corporation v. United States, 335 U.S. 573, where in considering the rates for the transportation of coal, it is said:

> "Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered." etc.

The Commission doubtless had in mind this rule when it considered, as we have, the effect of the establishment of the proposed through route and joint rate.[2]

We also attach importance to the fact, as did the Commission, that only Plaintiffs and one Intervenor took part in the proceedings before the Commission, and only Plaintiffs and such Intervenor are here seeking the establishment of such route and rates. No shipper nor consumer of sulphur nor other person is making common cause with Plaintiffs.[3]

We also point to the route which shipments of sulphur would follow in Plaintiffs' suggested through barge-rail

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[2] The Commission says:

"In reaching our conclusions herein we are not unmindful of the provisions of the national transportation policy which call for fair and impartial regulation of all modes of transportation subject to the act, so administered as to recognize and preserve the inherent advantages of each. We do not believe, however, that this policy requires us to force rail carriers, where they maintain a depressed rate to meet water competition to further depress their earnings on the traffic in order to favor the same form of competition. Danville is 184 miles from the end of the barge-line service, and the rail rate for the 184-mile haul is depressed at least from 13.5 to 9.2 percent of first class. If the barge lines can reasonably be expected to participate in this movement, the opportunity to do so should be afforded, not by the establishment of a through barge-rail rate differentially under an all-rail adjustment which is already severely depressed, but by a reduction in the barge rate from Galveston to East St. Louis, or by an increase in the depressed rail rate, or both. There is no allegation here that the all-rail rate, or any factor thereof, is unreasonably low." (Com. 1st Report, p. 407.)

[3] The Commission says:

"As stated, no shipper has evidenced an interest in the establishment of the rate sought, and the rate over the all-rail route which it is intended to meet is on a depressed basis. The defendants urge that their participation in barge-rail routes, as desired by complainants, is not shown to be necessary or desirable in the public interest." (Com. 1st Report, p. 406.)

route and through joint rate, i.e. by barge from Galveston to East St. Louis and by rail from East St. Louis to Danville, with no provisions made for the $1.50 per ton cost and expense of transportation from the sulphur mines to Galveston and of loading, unloading, etc. there. While Plaintiffs are willing to absorb charges of loading, unloading, etc., at East St. Louis, there is nothing to indicate that they are willing to absorb such Galveston charges.

Also, the Commission and we have compared the proposed joint barge-rail rate and the movement of sulphur thereunder with the other rates discussed herein, and the movement of sulphur thereunder. Although it is mandatory that the Act must be so administered as to recognize and preserve the inherent advantages of all modes of transportation, including water transportation, we discover here no violation or deviation from this rule. There is nothing in the record indicating that the refusal of the Commission to grant Plaintiffs' request or to approve the route and rate requested by Plaintiffs failed to preserve the advantages and rights of all parties. When the whole record is considered in the light of all the provisions of the Act and many cases construing same, we think Plaintiffs have not shown their claim of discrimination to be meritorious. Nor is there merit in Plaintiffs' claim that the establishment of the proposed through route and joint through rate is in the public interest. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591; Interstate Commerce Commission v. City of Jersey City, 322 U.S. 503; Interstate Commerce Commission v. Mechling, supra; Thompson v. United States, 343 U.S. 549; United States v. Great Northern Ry. Co., 343 U.S. 562.

3. Plaintiffs strongly press upon us the decision of the Supreme Court in the Mechling case (I.C.C. v. Mechling, supra). That Court there uses this language:

> "Judicial review of the findings of fact and the expert judgments of the Interstate Commerce Com-

mission where the Commission acts within its statutory authority is extremely limited. And § 307(d) of the 1940 Act authorizes the Commission 'in the case of a through route' to 'prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water'. Cf. United States v. Chicago Heights Trucking Co., 310 U.S. 344, 352-353; Board of Trade of Kansas City v. United States, 314 U.S. 534, 546. But the congressional debates and committee reports on the 1940 Act and the statutory provisions which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including 'differentials' between all-rail and water-rail rates. The provisions of the Transportation Act of 1940 which brought water carriers under Interstate Commerce Commission jurisdiction were vigorously opposed in Congress by those who feared that the Commission might raise barge rates in order to enable railroads better to compete with inherently cheaper water transportation. These opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service." etc.

It then held that under the facts in that case the Order of the Commission should not be permitted to stand because not based on adequate findings and evidence. But the facts there greatly differ from the facts here. Here, as has been pointed out, there is neither a showing that Plaintiffs' suggested route and rate is in the public interest, nor that it is fair to shippers, consumers and the public

nerally. Neither have Plaintiffs shown that the existing ates discriminate against them.

The case of Alabama Great Southern R.R. Co. v. United tates (supra) was one where, as here, the Commission as called upon to establish through routes and joint rough rates, and where the Court, citing the Ayrshire ase, points out that the Commission has to safeguard ne interests of the shipper and consumer as well as those f the carrier, etc. In speaking of the Mechling case, the ourt uses this language:

"Appellants also contend that the prescription of differentials in this proceeding deprive them of their inherent advantage contrary to the National Transportation Policy. They point to I.C.C. v. Mechling, 330 U.S. 567, as having established the principle that the lower costs of the large carrier there involved was an inherent advantage, and that the Commission had no discretion to approve a rate structure which would reduce such advantage. They argue that the 'fair and impartial regulation' called for by the National Transportation Policy demands that the rule of the Mechling case be applied impartially to protect the 'inherent advantage' of the rail carriers here.

"In the Mechling case, the Commission had fixed a rate for transportation of wheat east by rail from Chicago at a rate higher if it arrived in Chicago by barge than if by rail or lake. This was a plain case of discrimination. There were different rates provided for equal service without any showing that any additional service was rendered for the additional charge. Here the question is whether the barge lines may charge less than the railroads for the different service they render. There is no unlawful discrimination here as there was in the Mechling case. The differentials providing a lower rate for barge service do not constitute an 'unjust discrimination' by express

facts stated in the prior report will be repeated herein only to the extent necessary for a clear understanding of the issues.

Single-line rail service is provided by defendants from East St. Louis to Danville, and they participate with other defendant rail carriers in joint-line rail service for the transportation of sulphur from Galveston, Tex., to Danville. Beginning with and since 1951, the entire movement of sulphur from the Galveston area, approximating 20,000 tons a year, has been over the all-rail routes. The all-rail rate from Galveston is $9.184 per ton.[1] The combination barge-rail rate from Galveston is $8.27, composed of $5.32 by barge to East St. Louis, minimum 1,500 gross tons, and the rate of $2.95 by rail from East St. Louis to Danville. The complainants suggest a joint barge-rail rate of $7.67 from Galveston, which is based upon a joint barge-rail rate of $6.66 from Port Sulphur, La., to Danville, plus $1.01, the usual difference between rates by barge from Galveston and from Louisiana ports. The barge lines would absorb the charges incident to the transfer to rail cars at East St. Louis.

As was found by the division, the record affords no support for a finding that the present combination barge-rail rate, 91.4 cents lower than the present all-rail rate, is unreasonable for the through service offered thereunder. There also is no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate from Galveston and the suggested barge-rail rate from Galveston, or any particular differential, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation. The complainants cite decisions in which such rate

[1] Rates and rate differences stated herein are per ton of 2,240 pounds.